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18548.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 59.

SARAH A. HIBBEN,
Plaintiff in Error,

vs.

WILLIAM C. SMITH, JOSEPH H. PATTISON AND WILLIAM F. CHURCHMAN, PARTNERS TRADING AS THE FINANCIAL EXCHANGE; THE FINANCIAL EXCHANGE AND JOSEPH H. PATTISON,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

BRIEF FOR DEFENDANTS IN ERROR.

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STATEMENT.

(In Addition to the Statement of the Case in Brief of Plaintiff in Error.)

The complaint in this action is to foreclose an assessment for improvement of a street in the town of Irvington, Indiana.

The complaint alleges that all notices were given defendant (now plaintiff in error), including preliminary notice as to hearing prior to action adopting or rejecting a proposed resolution of necessity for the improvement.

Printed Record, p. 1.

The complaint alleges that hearings were granted and had as to such necessity and a final hearing as to benefits and as to the assessment.

Printed Record, pp. 2 and 3.

There is no denial in the record of the allegations of the complaint as to notice, the answer in denial having been withdrawn. (Printed Record, p. 57.)

It thus appears that plaintiff in error had lawful notice of all the proceedings from the first step to the last.

That plaintiff in error had actual knowledge is shown by the allegation of her fourth paragraph of answer to the effect that, before the adoption of the resolution of necessity, she remonstrated varbally and in writing, "for the reason that the cost of the improvement would be greatly in excess of the benefit thereof."

Printed Record, p. 27.

There is no allegation that she, at any time, iin any manner, objected that the Board of Trustees were incompetent because they were resident taxpayers or that some of the members owned property abutting the proposed improvement.

Plaintiff in error alleges in the third paragraph of her answer (printed record, p. 26) that she commenced an action against the town and asked for a *permanent* injunction preventing the town "from proceeding in any wise with the *continuance* or the *construction* of the *improvement* described," and that this action was, at the time of filing the answer, still pending. "That one of the reasons assigned why such injunction should be gramted was that said improvement would amount to a confiscation off this defendant's property and was wholly void and without warrantt of law."

It will be noticed that she did not assign, as a cause for injunction, the incompetency of the Trustees by reason of their interest.

Plaintiff in error does not allege that she was then or at any time ignorant of the interest of the Trustees.

The petition for injunction was filed April 4, 1898.

Printed Record, p. 2.

This answer was filed February 7, 1900 (printed record, p. 5), almost two years after the suit for injunction was filed, and, though the petition for injunction was still pending, plaintiff in error does not allege that she took any further step toward a hearing She did not ask a temporary restraining order.

BRIEF OF ARGUMENT.

That this statute of Indiana is not unconstitutional has been repeatedly decided in Indiana.

Adams vs. Shelbyville, 154 Ind. 467;
Leeds vs. Defrees, 61 N. E. Rep. 930;
Shank vs. Smith, 61 N. E. Rep. 932;
Martin vs. Willis, 60 N. E. Rep. 1021;
Schaffer vs. Werling, 156 Ind. 704.

The decision last above cited was reviewed upon writ of error by this honorable Court and affirmed.

Schaffer vs. Werling, Adv. Sheets, April 1, 1903, p. 449.

The decision of the State Supreme Court will be followed.

French vs. Barber Asphalt Co., 181 U. S. op. 328;
Gilman vs. Sheboygan, 2 Black. 510;
Whitman Co. vs. Buffalo, 118 Fed. Rep. 773;
Gallup vs. Schmidt, 183 U. S. op. 306-7.

This Court will not again consider a question it has directly and specifically decided.

Swope vs. Lefingwell, 15 Otto 3;
Foster vs. Kansas, 112 U. S. 201.

The procedure of the Trustees cannot render the statute unconstitutional.

Cummings vs. Bank, 101 U. S. 153.

The decision of the State Court rests on a ground of estoppel or waiver of rights which is broad enough to support the decision, hence a Federal question, if raised, will not be considered.

Schaffer vs. Werling, supra;
Gillis vs. Stinchfield, 159 U. S. 658;
Pittsburg, etc., Co. vs. Cleveland, etc,. Co., 178 U. S. 280;
Peirce vs. Somerset Ry. Co., 171 U. S. 641 op. 648.

The decision of the State Court holds that plaintiff in error had a remedy under the laws of the State and failed to invoke the same.

See Printed Record, pp. 63-65;
Smith vs. Shank, 61 N. E. Rep. 932.

In Indiana a remedy by injunction exists to prevent any action by interested Trustees.

Board vs. Justice, 133 Ind. op. 95.

A petition for injunction before action is an adequate and direct remedy. A defense of the character here made after judgment or assessment is a collateral attack.

Jackson vs. Smith, 120 Ind. op. 521;
Johnson vs. State, 116 Ind. op. 375;
Kiphart vs. R. R. Co., 7 Ind. App. 124;
Jackson vs. State, 104 Ind. 516.

The State Court construes such a judgment to be voidable only.

Board vs. Justice, supra.

No Federal question is involved in the construction by the State Court of a State judgment.

Newport Co. vs. Newport, 151 U. S. 527.

The rule that objection to the competency of an officer to pass on a question of a judicial nature must be made at the earliest opportunity or is waived, is a matter of State practice and local law, and as such does not infringe any right under the Federal Constitution.

Dreyer vs. Illinois, U. S. Sup. Court, Advance Sheets, Dec. 15, 1902, p. 28.

This is an established rule of practice in Indiana.

Baldwin vs. Runyon, 8 Ind. App. 348;
Bradley vs. Frankfort, 99 Ind. 417,
(and cases cited therein).

If it be found that the State Court opinion does not cover the matter of alleged incomptency of trustees, then the Court did not decide this question and committed no error.

Schaffer vs. Werling, supra;
Detroit Ry. Co. vs. Guthard, 114 U. S. 133.

The Supreme Court of the United States has held that, under the circumstances shown of record here, an injunction is an adequate remedy and that a constitutional right may be waived by not resorting to a remedy in equity.

Cummings vs. Bank, 101 U. S. 153;
Wight vs. Dwiggins, 181 U. S. 371.

ARGUMENT.

The assignments of error herein question the rulings of the Supreme Court of the State of Indiana as to the validity, under the Constitution of the United States, of a State statute providing for the improvement of town streets, and also the validity of the procedure of the Board of Town Trustees under said statute.

The statute involved is commonly known and designated in Indiana as the Barrett law, being the act of 1889 and amendments thereto in 1891. See Acts of 1889, p. 237, and Acts of 1891, p. 323, said act being designated in the opinion of the State Supreme Court in the case at bar, and in other decisions we shall cite, as Sections 4288-4299, Burns' Revision, 1894.

The points made in brief of plaintiff in error (p. 13) are as follows:

> "The specific objection to the *statute* is that, while it grants "to plaintiff in error a so-called hearing upon the question of "actual special benefits, as it must do to be valid under the rule in "Indiana, it does not provide for such a hearing as will constitute "due process of law, but that it leaves the determination of the "special benefits to an exercise of arbitrary power by the Board "of Town Trustees.
>
> "The specific objections to the *ordinances* and to the *assess-"ments* are:
>
> "(1) That they are made, not according to law, but by an ex-"ercise of arbitrary power (Rec., pp. 24, 28, 46, 50).
>
> "(2) That they are made by Trustees having a direct pecuni-"ary interest in the amount of the assessment antagonistic to the "interest of plaintiff in error (Rec., pp. 26, 28, 47, 51), and
>
> "(3) That the assessment was in substantial excess of the spe-"cial benefit accruing to the property of plaintiff in error (Rec., "pp. 29, 47, 52)."

The third specification of objections to the ordinances and assessments made in brief of plaintiff in error is a statement of a question of fact, to-wit: That the assessment was in substantial excess of special benefit.

This, in so far as it presents this as a fact, is not reviewable as a Federal question.

If it is pertinent here at all, it is covered by the other proposition that plaintiff in error was denied the privilege of showing this to be a fact.

The proposition of plaintiff in error, above stated, that the State law leaves the determination of special benefits to the exercise of arbitrary power, is simply another form of statement that the law is unconstitutional.

The proposition that the assessments were made, not according to law, but by an exercise of arbitrary power, is but another form of the statement that a proper hearing was denied.

Therefore it may be fairly said that the propositions of plaintiff in error are:

1. That the law is unconstitutional, in that it does not afford due process of law.

2. That the plaintiff in error was denied due process by the procedure of the board because:

(*a*) The Trustees denied a hearing.

(*b*) The Trustees were interested.

The statute involved has been held constitutional by the Supreme Court of Indiana.

Adams vs. Shelbyville, 154 Ind. 467;
Leeds vs. De Frees, 61 N. E. Rep. 930;
Shanks vs. Smith, 61 N. E. Rep. 932;
Martin vs. Wills, 60 N. E. Rep. 1021;
Schaffer vs. Werling 156 Ind. 704.

The last decision cited was reviewed by this honorable Court upon writ of error and affirmed.

Schaffer vs. Werling, Advance Sheets April 1, 1903, p. 449.

Therefore, not only is this a closed question because, under the decisions of this Court the holding of the Supreme Court of the State in such a matter will be respected,

French vs. Barber Asphalt Co., 181 U. S. op. 328;
King vs. Portland, 184 U. S. 61;
Gilman vs. Sheboygan, 2 Black. 510;
Whitman Co. vs. Buffalo, 118 F. Rep. 773,

but it is a closed question because this Court has held that it will not again consider a question which it has directly and specifically decided, but will affirm on the authority of its prior decision or will dismiss, though it has jurisdiction to consider and determine.

Swope vs. Lefingwell, 15 Otto. 3;
Foster vs. State of Kansas, 112 U. S. 201.

This leaves nothing for the consideration of this Court unless there be some Federal question growing out of the proceedings of the Town Board under the Barrett law in this particular matter.

The procedure of the Town Board cannot render the Barrett law unconstitutional. See

Cummings vs. Bank, 101 U. S. 153,

wherein it is said:

> "A law cannot be held unconstitutional because, while its just "interpretation is consistent with the Constitution, it is unfaith- "fully administered by those who are charged with its execution. "Their doings may be unlawful, while the statute is valid."

The law cannot be constitutional in one town and unconstitutional in another, or, with reference to the improvement of two

streets in the same town, constitutional when the procedure as to one is of a certain character and unconstitutional when the procedure as to the other is of another character.

If the procedure under the law has denied plaintiff in error due process it must be for other reason than unconstitutionality of the law.

In the matter at bar the procedure under this law is not questioned or involved in the errors assigned except in two particulars.

FIRST—Error of the State Supreme Court in holding that plaintiff in error was not denied due process of law by the alleged refusal of the Town Board to grant her a hearing as to special benefits.

SECOND—Error in holding that the plaintiff in error was not denied due process by the fact that all of the members of the board were taxpayers in the town and two of the members owned property abutting the street improved and liable to assessment therefor.

The State Supreme Court considered and determined the matter involved in both of these assignments of error and based its decision on propositions not involving Federal questions.

If the facts shown of record as to these matters presented a question or ground of decision upon which the ruling of the State Court may rest independent of any Federal question, then this Court will not reverse the decision of the State Court, though a Federal question be also involved.

In

Schaffer vs. Werling, supra,

appellant Schaffer alleged in answer facts tending to show that the town had *denied her a hearing,* and because of this denial she claimed the town was estopped to assert a lien against her property. This Court, in its opinion, said:

"The Circuit Court sustained a demurrer to this answer. It "may be observed that, so far as the question was one of estoppel, "it was purely a State, and not a Federal, question."

The syllabus to

Gillis vs. Stinchfield, 159 U. S. 568,

supported by the opinion, reads thus:

"A judgment of a State Court based upon an estoppel on gen- "eral principles of law and a statute of the State, irrespective of "any Federal question, as an independent ground broad enough "to maintain its judgment, cannot be reviewed in the United "States Supreme Court on writ of error, although a Federal ques- "tion was also decided."

See also

Pittsburg, etc., Co. vs. Cleveland, etc., Co., 178 U. S. op. 280.

In

Pierce vs. Somerset Ry. Co., 171 U. S. 641, op. 648,

we find the following language:

"A person may, by his acts or omission to act, waive a right "which he might otherwise have under the Constitution of the "United States. * * * Whether or not a person has lost a "right under the Federal Constitution by his act or failure to "act is not a Federal question which will sustain a writ of error "to a State Court."

The State Supreme Court held that remedies existed for the alleged wrongs of which plaintiff in error here complains, and that plaintiff in error, by her failure to act, waived those remedies.

Upon the first of the two assignments of error above referred to, to-wit: that the board denied plaintiff in error a hearing, the Court's opinion is as follows (and we may say parenthetically that the principle announced is broad enough to also cover the matter of the claimed incompetency of the board's members.) (Printed record, p. 65.):

"It was the duty of the board to accord appellant, as a prop-
"erty owner affected by the assessment, a hearing as contem-
"plated by the statute, and upon its refusal to do so the law af-
"forded her an adequate remedy for coercing the board to grant
"her such rights. *Shank vs. Smith*," (61 N. E. 932.)

The case of *Shank vs. Smith*, referred to involved the same law and same procedure for the improvement of the same street by the same contractor Smith, who is defendant in error here.

In *Shank vs. Smith* the Court's opinion upon this proposition of waiver is stated as follows (61 N. E. op. 936):

"Assuming that both the committee and the Board of Trustees
"refused to grant appellants a hearing, they should not be per-
"mitted to waive their right to bring *mandamus* to compel a
"hearing, or *injunction* against the approval of the engineer's re-
"port until it had been accorded, and make the denial of a hear-
"ing available as a defense in an action to collect the assessment.
"The right of the board in such cases to consider the engineer's
"report and adjust the assessments to benefits received is a *quasi-*
"judicial power. Here the proper notice was given, the board had
"jurisdiction of the person and subject matter, the power to de-
"cide, and their judgment, thus fair upon its face, cannot be col-
"laterally attacked."

The opinion in the case at bar then proceeds (p. 65):

"The fact that the board may have declined to award her a
"hearing or refused to receive and consider the facts or evidence
"which she offered from the purpose of rebutting the prima facie
"test or standard which the statute provided for the measurement,
"in the first instance, of the benefits to her property, would not
"open the door to a collateral assault on its judgment. The *de-*
"fense which appellant sought to make against the enforcement
"of the assessment, and the *relief* which she sought to obtain un-
"der the facts alleged in the *first, second, third* and *fourth* para-
"graphs of her cross-complaint, were nothing more than a collat-
"eral attack on the judgment of the board."

Thus we find that the decision in terms is that plaintiff in error waived a remedy afforded by the State law for a refusal to grant her a hearing, and the State Supreme Court deemed the remedy specified to be due process of law.

As we have said, the language of the Court is of such scope as to cover the other alleged wrong—the sitting of interested judges.

We submit that the Court intended that its treatment of one should dispose of both, for the Court says further (printed record, p. 66):

> "We have examined and fully considered all the questions dis-
> "cussed by appellant's learned counsel, but discover nothing in
> "the record to justify a reversal."

The State Constitution requires a statement by the Supreme Court, in writing, of each question arising and the decision of the Court thereon (Section 5, Article 7, Constitution of Ind.), and we must presume that the Court discharged this obligation fully and that the paragraphs of opinion we have quoted were intended to dispose of all questions within the principle announced.

The Court thus also held that a remedy existed whereby plaintiff in error could have enjoined the board, if members were incompetent, from taking *any step* toward an improvement of this particular street, which would result in an assessment by a board of trustees, some members of which owned property abutting the street, and that plaintiff in error waived her right to this remedy.

The only alleged interest which is worthy of consideration here is that Trustees own property abutting the street.

That interest as taxpayers is not such an interest as will render the members of the board incompetent is shown by authorities cited in the brief of plaintiff in error. Furthermore it is a matter of State policy to require that such boards be composed of resident taxpayers. See

State vs. Crane, 36 N. J. L. 394;
City of Minneapolis vs. Wilkin, 30 Minn. 140;
Bass vs. Ft. Wayne, 121 Ind. op. 391.

That the State Supreme Court intended its opinion to be understood as holding that plaintiff in error had a remedy by injunction, and waived it, is made apparent by the fact that the Court in former decisions had at length treated of this question, and had decided that, though a statute, in a special proceeding, did not provide for an appeal from the judgment of interested officers, a remedy by injunction existed which, if invoked promptly, would prevent the matter proceeding *to judgment* or *to an assessment*, and that this remedy was waived by failure to act.

Board vs. Justice, 133 Ind. op. 95.

Furthermore the opinion in *Board vs. Justice, supra*, shows that the Supreme Court of Indiana construes a judgment rendered under such circumstances as are apparent of record here to be a voidable, and not a void, judgment.

Hence the rule applies which was announced by this Court in

Newport Co. vs. Newport, 151 U. S. 527.

that no Federal question is involved in the construction placed upon the judgment of an inferior court by the Supreme Court of a State.

The Supreme Court, in the case at bar, holds that the judgment of the Town Trustees is not void and cannot be attacked collaterally, as is attempted by plaintiff in error.

Judging by the vast number of authorities cited by counsel for plaintiff in error to the proposition that no man may be a judge in his own case, and the greater number of authorities cited showing that judgments rendered by an interested judge or officer have been set aside, one might conclude that no court in Indiana, from the tribunal composed of own Trustees to the Supreme Court, had ever heard of this rule, or, if the idea had been suggested, it had been brushed aside as unworthy of consideration.

While the courts of Indiana need no defense at our hands, we may be pardoned for saying that no court in the Union has more fully recognized the doctrine that no man may be a judge in his own case, nor has any court more vigorously enforced this doctrine by setting aside judgments, upon proper application, when rendered by interested officers.

The courts of Indiana have, however, never allowed a party, "having notice and knowledge," to reserve his objection to the action of an interested officer until such time as others, depending thereon, have expended vast sums of money to his benefit, and have advanced to such a position that irreparable loss will result if the objection be later made and heeded.

The views of the Supreme Court of Indiana are shown by its opinion in *Board vs. Justice, supra*, op. 93, and we here quote this opinion at some length, for the reason that it treats of the matter in a comprehensive manner and in effect distinguishes many of the decisions cited by plaintiff in error, and for the further reason that it holds that, as the party complaining had a direct remedy by appeal, he could not subject the judgment to collateral attack by injunction, but if no direct remedy existed in the proceeding itself he might have enjoined if he had acted in time. We quote as follows:

> "The maxim that no man should be a judge in his own case is "so well established, both in reason and by authority, that it needs "neither argument nor the citation of adjudged cases in its sup- "port. The *effect to be given an adjudication rendered by a dis- "qualified tribunal is another* and a more troublesome question.
>
> "A judgment rendered by a court where the judge is disquali- "fied must necessarily be either void or voidable. If void, it may "be disregarded and treated as if it had never been rendered. It "would be no protection to officers acting under it. If, on the "contrary, such a judgment is not void, but merely voidable, it "will protect persons lawfully acting under it, and will be given "full force and effect as a valid and subsisting judgment until "reversed or set aside on appeal, or other appropriate method "of direct attack.

"The decided weight of authority seems to establish the propo-
"sition that at common law the acts of a disqualified judge are
"not mere nullities; they are liable to be avoided or reversed on
"proper application, but cannot be impeached collaterally. *Dimes*
"*vs. Grand Junction Canal,* 3 H. L. Cas. 759 (785); *State vs.*
"*Moses,* 36 N. J. L. 394; "*Fowler vs. Brooks,* 64 N. H. 423, S. C.
"13 Atl. Rep. 417; *Trawick vs Trawick's Admrs.,* 67 Ala. 271;
"*Moses vs. Julian,* 45 N. H. 52; *Rogers vs. Felker,* 77 Ga. 46;
"*Hine vs. Hussey,* 45 Ala. 496 (513); 1 Black on Judgments,
"Section 174; Freeman on Judgments, Section 145; Wells on
"Jurisdiction, Section 172.

"In many of the cases cited as sustaining the proposition that
"judgments rendered by a disqualified tribunal are void it will
"be found, upon examination, that the judgments so rendered
"were attacked on appeal, and the language must be construed
"as applicable to the case before the court. *Peninsular R. W. Co.*
"*vs. Howard,* 20 Mich. 18; *Gregory vs. Cleveland, etc., R. R. Co.,*
"4 Ohio St. 675. In many States statutes have been passed which
"prohibit judges disqualified by interest or relationship from act-
"ing in certain cases. Under these statutes it has usually been
"held that judgments rendered in contravention of statute are
"not simply voidable, but void. Black on Judgments, Section
"174, and cases cited; *Templeton vs. Giddings,* 12 S. W. Rep.
"(Tex.) 851; *Frevert vs. Swift,* 19 Nev. 363.

"We do not hold that a case might not arise where a judgment
"rendered by a sole judge might not be absolutely void; such, for
"instance, as one granting himself a divorce from his wife.

"While it has been held that if incompetent magistrates or
"judges composing a court sat at the hearing, a judgment ren-
"dered by the Court should be quashed or set aside (*Peninsular*
"*R. W. Co. vs. Howard, supra; Queen vs. Justices, etc.,* 6 Q. B.
"753), we are of the opinion that in an action brought to declare
"such judgment a nullity the fact that the major portion of the
"members of the court were disinterested is not without weight;
" and, also, the fact that a large number of parties litigant, other
"than such disqualified judge, were interested in and would be
"affected by such judgment.

"It will be presumed in a collateral attack, such as this, and
"especially in the absence of an averment to the contrary, that
"the County Auditor gave the notice required by Section 5092,
"R. S. 1881, of the time and place of meeting of the viewers
"(*White vs. Fleming,* 114 Ind. 560), and it appears from an ex-
"exhibit of the complaint that the notice required by Section

"5096, R. S. 1881, was given. This gave the appellees, and all "other land owners interested, an opportunity to appeal to the "Circuit Court, in which the proceedings taken before the Board "of Commissioners might have been reviewed before a duly con- "stituted and impartial tribunal. *White vs. Fleming, supra; "Markley vs. Rudy,* 115 Ind. 533; *Fleming vs. Hight,* 101 Ind. "466; *Wilkinson vs. Lemasters,* 122 Ind. 82; *Board, etc., vs. Ful- "len,* 118 Ind. 158.

"If no provision had been made in the statute *for notice* to "the land owners affected, at some stage of the proceedings, or "*opportunity given by appeal* of having their causes tried by a "duly constituted and impartial tribunal, the remedy by injunc- "tion would doubtless be open to the appellees. *McEneney vs. "Town of Sullivan, supra; Bass vs. City of Ft. Wayne,* 121 Ind. "389; *Updegraff vs. Palmer,* 107 Ind. 181; *Forsythe vs. Kreuter,* "100 Ind. 27. In *Osborn vs. Sutton, supra,* it was held that an "objection to the competency of an assessment committee must be "made at the time the committee is appointed, or within a rea- "sonable time thereafter.

"In *Bradley vs. City of Frankfort,* 99 Ind. 417, a commissioner " to assess damages to property affected by the opening of a street " was related to one who was financially interested in having it "opened. It was held that one served with notice of the meeting "of the commissioners before the assessment against his prop- "erty, and of the incompetency of the commissioner, must then "and there make the objection, or it will be deemed waived.

"The general rule to be deduced from these and similar cases "is that where the Board of County Commissioners has *jurisdic- "tion* of the *subject matter,* and has *acquired jurisdiction* of the "*person* by giving the required notice and an *opportunity by ap- "peal* is given of having a trial by an impartial tribunal, the pro- "ceedings are not subject to a collateral attack by injunction or "otherwise."

We have no quarrel with decisions cited by plaintiff in error to the effect that taxpayers are not competent jurors and that their verdicts will be set aside.

The same authorities hold that if a party have knowledge of the disqualification or fail to exercise his right of examination before accepting the jury, he may not thus chance a verdict in his favor and object if it be adverse.

Nor do we question such decisions as *Campbell vs. Dwiggins,* 83 Ind. 473, cited by plaintiff in error.

There an officer was empowered by legislative act to determine that a ditch needed repair, to do the work and to report his assessment therefor to the County Auditor, who in turn caused it to be entered on the tax duplicate and *all this without any notice* to or hearing of the parties assessed. The lack of notice and opportunity for hearing was deemed of such controlling weight that the Court did not consider the allegation that the officer making the assessment owned property assessed, but the Court held the law unconstitutional and enjoined enforcement of the assessment.

Nor is the decision in *Chicago Ry. Co. vs. Summers,* 113 Ind. 10, cited by plaintiff in error, contrary to our position. There the attorney who filed complaint upon which judgment was rendered was also a justice of the peace.

He procured a change of venue to his own court, and still acting as plaintiff's attorney, rendered judgment for his client *over objection* by defendant to his acting as judge. He could not take jurisdiction. He was a usurper. The defendant harmed no one by waiting, after prompt objection, until it was sought to enforce the judgment. The defendant waived nothing.

This decision shows great respect on the part of the Supreme Court of the State of Indiana for the rule that no man may be a judge in his own case.

We need not consume this Court's time by reviewing the many decisions cited by plaintiff in error. In so far as they are, by counsel, treated of in detail they are easily classified and it is observed that almost without exception the judgments were set aside on appeal, or by some direct method known to the procedure of the State wherein rendered.

Many of the decisions cited show remedies available if sought in time.

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The decision in *Chicago Ry. Co. vs. Summers,* 113 Ind. 10, is distinguished in

Baldwin vs. Runyan, 8 Ind. App., *op.* 348,

and in the latter case it is held that—

"If the appellant in the present case was aware of the alleged "disqualification of the justice at the time he tried the cause, it "was his imperative duty to make it known and object to his "acting as judge in such trial. He could not be permitted to sit "quietly by and await the result of the trial and then in the event "of an adverse decision raise an objection to the judge after the "rendition of judgment."

That such incompetency is waived by failure to object see, also,

Osborn vs. Sutton, 108 Ind. 443;
Harbaugh vs. Albertson, 102 Ind. 64.

We might cite many more such decisions, but these suffice to show that this is a settled matter of practice and local procedure in Indiana, and being such it infringes no right secured by the United States Constitution.

Dreyer vs. Illinois, U. S. Sup. Crt. Adv., Sheets' Dec. 15th, 1902, p. 28.

If it be found, however, that the State Court's opinion does not cover this matter of remedy for the alleged incompetency of the members, then it follows the Court did not decide this question and has not committed the error assigned.

Schaffer vs. Werling, U. S. Sup. Crt., Jan. 27, 1903;
Detroit Ry. Co. vs. Guthard, 114 U. S. 133.

Grant, however, that the State Supreme Court did not base its decision, as to the incompetency of the trustees, upon an estoppel or a waiver, but decided in general terms that the laws of Indiana afforded due process of law in this particular, then we submit—

First—That the decision of a State Court placing a construction upon the State statutes and laws to the effect that they provide due process will be respected by the Supreme Court of the United States.

King vs. Portland, 184 U. S. 61;
Gilman vs. Sheboygan, 2 Black. 510;
Gallup vs. Schmidt, 183 U. S., *op.* 306-7.

Second—We submit that the State Supreme Court was not in error as to the existence of a remedy.

While it is true that the statute does not provide for an appeal from the decision fixing the assessment, nor for a change of venue from interested trustees, if there are such, or any similar remedy in the particular proceedings, yet we submit to your Honors that there existed, independent of the street improvement law, an effective remedy by way of injunction against action by the board, and to this proposition that an injunction is a proper and adequate remedy we cite again the opinion of this Court in

Cummings vs. Bank, 101 U. S. 153,

wherein it is held that as against an unequal tax a court of equity may restrain the operation of an unconstitutional exercise of power and do so independently of any statute expressly provided for such injunction.

We copy a quotation made in brief of plaintiff in error from *Wight vs. Dwiggins,* 181 U. S. 371:

"Special facts showing an abuse or disregard of the law, result-
"ing in actual deprivation of property may give grounds for ap-
"plying for relief to a court of equity."

And we add another quotation from the same decision:

"The constitutional right against unjust taxation is given for
"the protection of private property and may be waived by those

"affected who consent to such action to their property as would "otherwise be invalid."

"Under some circumstances a party, who is illegally assessed, "may be held to have waived all right to a remedy, by a course of "conduct which renders it unjust and inequitable to others that he "should be allowed to complain of the illegality. * * * Some "of the cases go far in the direction of holding that a mere fail- "ure to give notice of objections to one, who, with the knowledge "of the person taxed, as contractor or otherwise, is expending "money in reliance upon payment from the taxes may have the "same effect."

Third—We submit that, as this remedy by injunction existed, plaintiff in error cannot successfully claim that she was denied due process of law unless she shows that she sought to invoke this remedy by injunction and that she was denied the right.

The record does not disclose that appellant at any time, in any manner, raised any question *as to the competency* of the members until long after all proceedings of the board were ended, the street improvement completed and this action commenced for the foreclosure of the assessment lien.

It is true that the answer of plaintiff in error shows (printed record, p. 26) that she instituted an action for an injunction against the letting of the contract because of anticipated excessive cost, but it is not alleged that she therein made any suggestion as to the competency of the members of the board nor that she prosecuted that suit to effect or to defeat.

The mere beginning of a suit does not relieve a party from the charge of laches if he fails to duly prosecute the same.

Johnson vs. Standard Mining Co., 148 U. S. 360;
Planet Co. vs. St. Louis Ry. Co., 115 Mo. 613.

The first appearance of this fact in the record is in the answer of plaintiff in error to the complaint herein to foreclose, and she does not allege ignorance during the time she might have petitioned for

an injunction, nor does she allege that the trustees who made the final assessment were not in office during all the proceedings.

So it is clear that the remedy existed and that plaintiff in error did not seek to use the remedy and was not denied its benefit.

We make these suggestions not for the purpose of arguing here a question of estoppel or waiver, but for the purpose of showing that appellant was not denied due process. She did not avail herself of due process provided.

It is appropriate to here observe that it is no answer, under the circumstances in this case, to say that a new assessment may be made, by some succeeding board of trustees, none of the members of which own property on this street, because this objection is not one which affects the matter only at the time of fixing the assessment and no earlier, nor is it an objection which affects only some irregularity which may be corrected on a re-assessment, but the objection, if now available, reaches the root of the board's action and renders void the original declaration or resolution of necessity for an improvement of the street and the holding of the board that it should be a brick street, of a certain width and with certain curbs.

If the contractor were now put to the necessity of having the matter reconsidered from the start, the board now in power would of necessity pass on all these preliminary questions and would have power to decide that no improvement was needed, or that the pavement should be asphalt and no court could require any different decision.

In this connection we desire to call the attention of your Honors to a paragraph of the opinion in the case at bar for the purpose, first, of illustrating the kind of situation which justifies a reassessment without danger to substantial rights of any party and for the purpose, second, of explaining that this portion of the opinion does not hold or intimate that this assessment should be remade by another board.

An assessment was made in this proceeding against certain unplatted land of plaintiff in error. The description used in the assessment roll was too indefinite to identify, or furnish means for identifying, the land intended. (Printed record, p. 4, last item in Exhibit A.) This lack of description was the basis of the fifth paragraph of answer in suit to foreclose (Printed record, p 31) and of the cross-complaint to quiet title (Printed record, p. 53) and the Supreme Court in treating of the question whether the contractor had a *lien* which might be perfected on a reassessment by a proper description says (Printed record, p. 65):

"When Sections 3 and 7 of the Barrett law (Sections 4290, "4294, Burns' Ann. St., 1894) are construed in connection with "each other, it is manifest that the assessment levied by a board "of trustees or by a common council of a city, as the case may be, "for the improvements authorized by the statute, together with "the interest accruing after such assessment is made, becomes a "lien, to the extent of a tax lien, from the time or date at which "the improvement or work was ordered. The power and duty "of the board of trustees or common council, as the case may be, "under the statute, to make an assessment for such improvements, "*continue* in that tribunal until legally exercised. While it is "true that a void *assessment* may be defeated or set aside and held "for naught in a collateral action, still, under such circumstances, "if the *principal* proceedings of the board upon which an assess-"ment must rest *are not also void*, a valid reassessment may be "made, by which the objectionable matters or grounds which re-"sulted in rendering the first assessment invalid, may be avoided. "Consequently, while an invalid assessment may be set aside, or "its enforcement defeated, still the Court, under its judgment, in "so doing, would not be authorized thereby to impose or destroy "the lien arising out of a subsequent reassessment; and such lien, "as previously stated, would attach to the property as of the date "when the improvement in question was ordered to be made. "*Balfe vs. Johnson*, 40 Ind. 235; *Ball vs. Balfe*, 41 Ind. 221; "*Reeves vs. Grottendick*, 131 Ind. 107, 30 N. E. 889; *Sands vs.* "*Hatfield*, 7 Ind. App. 357, 34 N. E. 654; *Becker vs. Railway* "*Co.*, 17 Ind. App. 324, 46 N. E. 685; Wats. St. Liens, Section "1224."

It is easily seen that at this late date the contractor has no assured remedy and the inequity of allowing plaintiff in error to now defeat the contractor when she might have enjoined the board before he did his work is apparent.

Defendant in error Joseph H. Pattison, William F. Churchman and The Financial Exchange were made parties defendant in the action below to answer as to any interest they might have in the assessments.

No question is involved in their demurrers to the answers and cross-complaint that is not involved in the demurrers of defendant in error Smith.

For them we may be permitted to say there is no error.

We respectfully submit, That the statute in question is constitutional.

That there is no other Federal question alone presented, but rather a question whether plaintiff in error waived a remedy which the laws and decisions of Indiana afforded and that therefore the decision of the Supreme Court of Indiana should be affirmed.

Respectfully submitted,

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